



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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MEMORANDUM FOR DIRECTOR, FIELD OPERATIONS EAST  
DIRECTOR, FIELD OPERATIONS WEST  
DIRECTOR, APPEALS PROCESSING SERVICES  
DIRECTOR, APPEALS TECHNICAL GUIDANCE

FROM: Beverly Ortega Babers   
Director, Policy and Valuation

SUBJECT: Interim Guidance for Initial Statute Review Standards in Trust  
Fund Recovery Penalty Cases

The purpose of this interim guidance is to clarify initial statute review standards for Trust Fund Recovery Penalty (TFRP) cases and provide revised procedures for establishing TFRP cases on Appeals Centralized Database System (ACDS).

To ensure that the assessment statute expiration date is protected in TFRP cases, the settlement officer or appeals officer assigned a TFRP case must verify, within five (5) workdays from receipt of the case, that:

1. Letter 1153(DO) was mailed or delivered prior to expiration of the Assessment Statute Expiration Date (ASED).
2. The protest was timely.
3. The protest is valid.
4. The power of attorney (Form 2848) is valid.
5. All periods listed on Form 2751 are listed on the case summary card.
6. Statute entries on the case summary card are correct.

These procedures are effective immediately and will be incorporated into IRM 8.25.2 and IRM 8.21.5 within one year from the date of this memorandum.

If you have any questions, please contact Munir Ebeid, Director, Tax Policy and Procedure Collection and Processing or a member of your staff may contact Davida Parker, TFRP Program Analyst at 904-665-0968.

Attachment  
cc: [www.irs.gov](http://www.irs.gov)

## Attachment

### Interim Guidance for the Initial Statute Review in Trust Fund Recovery Penalty Cases

To verify the statute on a trust fund recovery penalty (TFRP) case and to ensure that the statute is properly monitored by Appeals, verification of the information on Appeals Centralized Database System (ACDS) is necessary. This guidance provides an overview of case carding and case closing procedures with respect to the assessment statute expiration date (ASED) and the collection statute expiration date (CSED) for TFRP cases.

An overview of changes in the TFRP statute that originated in the Taxpayer Bill of Rights 2 (TBOR2) is also provided.

#### Section 1: Background

TBOR2, enacted on July 30, 1996, required that the IRS send a preliminary 60-day notice of a proposed assessment before making notice and demand for payment of the trust fund recovery penalty, unless it is determined that collection of the trust fund recovery penalty is in jeopardy. This preliminary notice also provides for an appeal of the proposed assessment.

Letter 1153(DO) is the notice that Collection sends to the responsible person. Collection's policy is to send the letter via a certificate of mailing (Postal Service Form 3817) or certified mail, or to deliver the notice in person to the responsible person. IRM 5.4.7 recommends that the revenue officer call the responsible person to confirm receipt of the notice, if a return receipt was not requested.

To provide the IRS time to process the assessment or appeal, TBOR2 included a provision that extends the assessment statute under certain circumstances. Pursuant to IRC section 6672(b)(3), if the 60-day notice is issued before the expiration of the assessment statute, the statute will not expire before the later of:

- the original ASED,
- the ASED extended by a waiver (Form 2750), properly executed,
- 90 days after the 60-day notice was mailed or delivered in person, or
- if a timely protest is filed, 30 days after Appeals' final administrative determination, defined below.

The ASED, suspended during the appeals process, begins running on the earlier of, the date of the Appeals Team Manager's (ATM's) approval signature (the final administrative determination), on:

- Form 5402, Appeals Transmittal and Case Memo, or
- Form 866 or Form 906, Closing Agreements.

When the ATM enters a closing date on ACDS on a case with a TBOR2 statute code, ACDS is programmed to generate a revised statute date in the statute date field by adding 30 days to the ATM Approval Date (ACAPDATE). For this reason the ATM should ensure that the approval signature dates on Forms 5402, 866, or 906 are identical to the ACAPDATE.

## **Section 2: TFRP Statute Review**

The statute on a TFRP case will be reviewed within five (5) workdays of receipt to verify that the information on the case summary card is correct and that the assessment or collection statute is protected. An adequate initial review of statutes in a TFRP case will include the determination that:

1. Letter 1153(DO) was mailed or delivered prior to the expiration of the ASED.
2. The protest was timely.
3. The protest is valid.
4. Form 2848, Power of Attorney and Declaration of Representative, is valid.
5. All periods listed on Form 2751, Proposed Assessment of Trust Fund Recovery Penalty, are listed on the case summary card.
6. Statute entries on the case summary card are correct.

This review must be documented in the case activity record (CAR), including any corrective action taken or initiated.

### **1. Letter 1153(DO)**

Was the letter notifying the taxpayer of the proposed assessment mailed or delivered to the taxpayer's last known address prior to the expiration of the ASED? A taxpayer's last known address is the address on the taxpayer's most recently filed return unless the taxpayer filed a change of address with the United States Postal Service or gave clear and concise notification to the Service of a new address. Treas. Reg § 301.6212-2; Rev. Proc. 2001-18.

### **2. Timely Protest**

A protest (whether perfected or unperfected) is timely if it is delivered, faxed, properly postmarked or mailed by certified or registered mail, on or before the 60th day (75th day if the letter was addressed outside of the United States) after the date Letter 1153(DO) was mailed or personally delivered.

In determining the timeliness of the protest, the guidelines in IRC section 7503 should be followed, which state, in part: "When the last day prescribed under authority of the Internal Revenue laws for performing any act falls on Saturday, Sunday, or a legal holiday, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday."

A private postage meter stamp is not evidence of when a request for appeal was mailed; it merely establishes when the request was stamped.

IRM 5.7 directs the revenue officer to date stamp Letter 1153(DO) with the date of service and document in the Integrated Collection System (ICS) case history for the employer's case, the method of delivery and any discussions with the responsible party related to receipt of Letter 1153(DO). The Automated Trust Fund Recovery (ATFR) program will be updated when Letter 1153(DO) is personally delivered.

The ASED is not suspended by TBOR2 if the protest is not timely. If the protest was received late, take the following actions:

1. Close the case as a premature referral.

2. In the remarks section of Form 5402, include the statement: "Due to untimely protest, the ASED is not suspended by TBOR2. Assessment of the TFRP is necessary. The ASED expires (enter date)."
3. Select closing code 20 and the resolution reason code "Appeal not timely."
4. Inform the taxpayer/power of attorney that the case has been returned to Collection (CPM Advisory) for assessment because the protest was not timely filed.

If the TFRP case contains no evidence of the date the protest was mailed or received:

1. Review the ICS case history for the business and the responsible party to confirm the date that the protest was mailed or received. Absent unusual circumstances, the history entry should have been made within one week of receipt of the protest or as soon as possible after the revenue officer returned to the office.
2. If you are unable to verify timeliness of the protest by your review of the ICS history, call the revenue officer to request proof of timeliness. Allow seven (7) days from the date of your call for the revenue officer to respond to your request.
3. If the revenue officer is unable to prove timeliness, call the taxpayer/representative to request proof of timeliness. Allow 14 days from the date of your call for the taxpayer/representative to respond to your request.
4. If proof of timeliness is not provided, close the case as a premature referral by following the steps listed above.

**Note:** Any actions you take to verify timeliness should not jeopardize the ASED. Advise Collection immediately if the ASED is imminent so that a quick or prompt assessment can be made. Questions about a particular timeliness issue should be referred to Area Counsel.

**Note:** IRC 7508 and 7508A postpone certain time-sensitive acts when a person is serving in the armed forces in a combat zone, or there is a presidentially declared disaster. Rev. Proc. 2007-56 includes the 60-day period for appealing the proposed assessment of a trust fund recovery penalty.

### 3. Valid Protest

Letter 1153(DO) provides instructions that the taxpayer must follow to receive an appeal of the proposed assessment. A Small Case Request is appropriate if the total amount of tax, penalties, and interest for each tax period is \$25,000 or less. If more than one tax period is involved and any tax period exceeds the \$25,000 threshold, a Formal Written Protest for all periods must be filed.

#### Small Case Request

- Send a letter to the attention of the Person to Contact at the address shown on the top of Letter 1153(DO).
- Enclose a copy of Letter 1153(DO) or provide his or her name, address, and social security number on the letter.
- Include a statement requesting an Appeals conference.
- Enclose a list of the disputed issues and the reasons for the disagreement.
- Identify the dates and amounts of any payments in dispute.
- Include a clear explanation of his or her duties and responsibilities, specifically the duty and authority to collect, account for, and pay the trust fund taxes.
- Submit two copies of the small case request.

## Formal Written Protest

- Send a letter requesting an Appeals conference to the attention of the Person to Contact at the address shown on the top of Letter 1153(DO).
- List his or her name, address, and social security number on the letter.
- Enclose a copy of the Letter 1153(DO) or list the date and number of the letter received.
- List the tax periods being protested.
- Enclose a list of the disputed issues and the reasons for the disagreement.
- Identify the dates and amounts of any payments in dispute.
- Include specific dates, names, amounts, and locations which support his or her position.
- Include a clear explanation of his or her duties and responsibilities, specifically the duty and authority to collect, account for, and pay the trust fund taxes.
- Sign the written protest under the penalties of perjury, by making the following statement (the jurat):

*"Under the penalties of perjury, I declare that I have examined the facts stated in this protest, including any accompanying documents, and to the best of my knowledge and belief, they are true, correct and complete."*

If the taxpayer's representative prepares and signs the protest for the taxpayer, the representative must substitute a declaration stating:

1. He or she submitted the protest and accompanying documents.
2. He or she knows personally that the facts stated in the protest and accompanying documents are true and correct.

**Note:** Collection will send a taxpayer's case to Appeals, even if the taxpayer fails to perfect the protest. This is to ensure that any taxpayer who wishes to appeal will have the opportunity to do so.

## Defective Protest

If the taxpayer's protest is defective:

1. Contact the taxpayer/representative to request that any defects in the protest be corrected.
2. If the taxpayer/representative fails to perfect the protest within 30 days of your request, consider the protest withdrawn and close the case.
3. Select closing code 13 (Unagreed) and resolution reason code "Taxpayer/Representative failed to perfect invalid/defective protest."

**Note:** TFRP cases should not be closed if the taxpayer or power of attorney made an effort to comply with the Small Case Request or Formal Written Protest requirements by providing most of the required information. However, the Formal Written Protest must be signed under the penalties of perjury.

Questions about a particular protest should be referred to Area Counsel for advice.

## 4. Valid Power of Attorney (POA)

A timely protest that is signed by a representative (and not signed by the taxpayer) is still a timely protest even though:

- The representative failed to submit a POA with the protest.
- The representative submitted a defective POA.
- The representative is not authorized to represent the taxpayer before Appeals.

Under these circumstances either the taxpayer or the representative must cure the POA for the protest to be timely.

## Background

The Tax Court as well as the Conference and Practice Requirements have applied the law of agency as a supplement to the Code and regulations. The law of agency provides guidance that protects the taxpayer's right to file a protest and the Service's time to assess the penalty imposed by IRC section 6672(a).

When a taxpayer engages a representative to represent him/her before the Service, an agency relationship is formed. If the representative acts with actual authority by signing the protest, the Service will accept the protest but must attempt to secure a valid Form 2848, Power of Attorney and Declaration of Representative (POA), or a protest signed by the taxpayer. The ASER is suspended by TBOR2 until the final administrative determination is made in the case.

The taxpayer or representative can cure the defective or missing POA by executing a valid Form 2848. The revised Form 2848 should be attached to the original Form 2848 if the original Form 2848 is defective.

Examples of invalid or defective powers of attorney include:

- The POA lists the name of the business entity instead of the taxpayer's name.
- The POA has missing periods.
- The tax form number is incorrect.
- The representative is not authorized to represent the taxpayer before Appeals.

If...	Then...
The POA was not provided or is for the business entity instead of the taxpayer.	The taxpayer must provide a valid POA for the representative who signed the protest.
The POA is valid, except for missing periods.	The taxpayer/representative must provide a corrected POA to include the missing periods. If a corrected POA is not provided, ask Appeals Processing Section (APS) to delete the missing periods from the case summary card and create a case summary card for the missing periods. Close the case created for the missing periods.
The POA contains other errors.	The taxpayer/representative must correct the POA.

If...	Then...
An unauthorized person signed the protest.	The unauthorized person cannot represent the taxpayer before Appeals. To receive an appeal, the taxpayer must sign and date the protest.
An authorized representative failed to sign the POA.	The POA must be signed and dated by the representative.

**In all cases, the taxpayer can validate the protest by signing and dating the original protest or signing and dating a copy of the original protest. Attach this copy to the original protest.**

If, within 30 days of your request, the taxpayer or representative fails to provide or perfect the POA or the taxpayer fails to sign and date the protest (original or copy):

- Consider the protest withdrawn and close the case.
- Select closing code "13" (Unagreed), and the resolution reason code "Taxpayer/Representative failed to perfect invalid or defective POA."
- Include the following statement in the comments section of Form 5402: "The protest is considered withdrawn because the taxpayer did not provide or perfect the POA or sign the protest on his own behalf."

Refer to IRM 11.3 and IRM 21.3 for guidance concerning powers of attorney and who to contact about the defective or missing POA. In most cases, the taxpayer should be contacted in lieu of the representative. Unauthorized disclosure is a concern in these cases.

## 5. Periods on Case Summary Card

The TFRP statute review must include verification that the case summary card is correct. All periods listed on Form 2751, Proposed Assessment of Trust Fund Recovery Penalty, should be listed on the case summary card, with one exception.

If the taxpayer's protest clearly indicates a desire to protest only specific periods listed on Form 2751 and his or her agreement with the assessment of the other periods:

- Call the taxpayer/representative to verify the desire to appeal specific periods only. Ensure the taxpayer understands that Appeals will release jurisdiction on the periods not being appealed and Compliance will assess the taxes immediately and initiate collection action.
- Ask APS (through your ATM) to remove the periods not appealed from the case summary card and create a case summary card for the periods deleted from the original case summary card.
- Close the second case as a premature referral.
- In the remarks section of Form 5402, include the statement: "The taxpayer does not wish to protest the assessment of the following specific periods: (list periods here). Assessment of these periods is necessary. The ASER expires (enter date). Appeals retains jurisdiction of the following related periods: (list periods here)."
- Select closing code 20 and the resolution reason code "Specific periods excluded from taxpayer's protest."

## 6. Statute Entries on Case Summary Card

Appeals will not accept a TFRP case with a late protest unless the TFRP has been assessed and a claim filed. All TFRP cases will fall within one of the following two categories:

1. TBOR2 Case – Timely filed protest – TFRP not assessed
  - a. The Statute Code is TBOR2.
  - b. No statute date is entered.
  - c. The Type of case is TFRP.

**Note:** A case in which the taxpayer signed a Form 2750, Waiver Extending Statutory Period for Assessment of Trust Fund Recovery Penalty, falls within this category.

2. TFRP Claim Case – TFRP assessed
  - a. The TFRP penalty is assessed.
  - b. The Statute Code is CSED.
  - c. The correct CSED date is entered.
  - d. The Type of case is TFRP (even though Form 843, or its equivalent, was filed).

**Note:** Appeals does not accept claim cases if less than 180 days remain on the statute for collection. This 180-day provision applies when expiration of the statute could result in loss of a liability. If less than 180 days remain for filing suit in a case involving a claim previously disallowed by a function other than Appeals, acceptance of the case requires approval from the Appeals Area Director.

**Note:** A taxpayer may submit an informal claim however the required payment must be made.

### Incorrect Statute Date on ACDS Case Summary Card

If the statute date shown on ACDS is incorrect, provide the correct statute date to APS by generating and sending the *ACDS Update Request Form* following the procedures below:

- Send the *ACDS Update Request Form* by secure email to the ACDS Mailbox for their location. The *ACDS Update Request Form* located on APGOLF **must be** used. The *ACDS Update Request Form* is only used to **correct** statute dates.
- After submitting the correct statute date to APS, verify that the update was made by accessing ACDS. If ten (10) workdays pass and the correction does not appear, contact your ATM who will contact the Processing Team Manager (PTM).

### Section 3: Expedite Closing Procedures

A quick assessment will be necessary when there are fewer than 30 days remaining on the ASER. In contrast, a prompt assessment is required when immediate collection action is needed on the account. All assessments or adjustments on TFRP accounts will be made by Advisory. See IRM 5.7.6, *Trust Fund Penalty Assessment Action*.



**Actions to take when closing a case with an ASED that will expire within 30 days of the final administrative determination:**

**Appeals Technical Employee:**

The protest was timely filed (TBOR2 case):

- In the remarks section of the customized Form 5402, select the option, "Expedite – quick assessment required. ASED expires 30 days from the ATM's signature date."

The protest was not timely filed (the ASED is not suspended by TBOR2):

- In the remarks section of the customized Form 5402, type the statement, "Due to untimely protest, the ASED is not suspended by TBOR2. Assessment of the TFRP is necessary. The ASED expires (enter date)."

In all cases, advise your ATM that quick or prompt assessment action is required on the case.

**Appeals Team Manager or Designee:**

1. Place the case in a folder marked "EXPEDITE."
2. Hand-deliver the case to APS, if located in the same building. If located elsewhere, take appropriate actions to ensure the Form 5402 and Form 2749 are provided immediately to the responsible Collection Advisory unit.
3. Alert the PTM that a TFRP case requiring quick or prompt assessment action by Advisory has been sent.
4. Send the closed case, via overnight mail, to APS. Ensure the case is received by APS within five (5) days of the ACAPDATE.

**Appeals Processing Section:**

1. Immediately fax Form 5402 and Form 2749 to Advisory at the fax number listed in the "To" box on Form 5402 (if the ATM hasn't already done so).
2. Call Advisory to verify receipt of the assessment documents.
3. Follow normal closing procedures.
4. Hand deliver the TFRP case file to Advisory, if located in the same building.
5. If Advisory is located elsewhere, return the TFRP case file, via overnight mail, to Advisory within 15 days of the ACAPDATE.
6. Form 3210 should be marked "ASED – Expedite."